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No. 80-1870

IN THE

Supreme Court of the United States

NEW YORK TYPOGRAPHICAL UNION NO. 6,
Petitioner,

v.

TRIANGLE PUBLICATIONS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the District Court's ruling that certain supplemental, unfunded pension payments to members of Petitioner Union provided for in the collective bargaining agreement were coterminous with that agreement.

2. Whether the Court of Appeals properly affirmed the dismissal of Petitioner Union's claim for suspension pay based on the unique circumstances of this case including the finding that defendant was prejudiced by the Union's failure to assert the claim until after the close of the second trial.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, Triangle Publications, Inc., opposes the Petition for Writ of Certiorari filed herein on the grounds set forth hereinafter.

STATEMENT OF THE CASE

Petitioner Union commenced this action almost two years after the April 1972 strike of its members caused the shutdown of the Morning Telegraph, a horse-racing newspaper in New York City owned by Respondent which had been in business since 1833. The Complaint sought damages and injunctive relief based upon the alleged relocation of the Morning Telegraph composing room to Hightstown, New Jersey. Both the strike, which lasted one and a half years, and the lawsuit were based on Petitioner's contention that it was entitled to represent employees at a plant in Hightstown, New Jersey publishing another horse-racing newspaper, the Daily Racing Form, also owned by Respondent,[1] even though any such recognition of Petitioner Union would have been barred by Respondent's collective bargaining contract with another union local representing the Hightstown employees.

Following the filing of a counterclaim by Petitioner, the Union commenced a course of delay and violation of

1. In 1972, Respondent operated nine plants throughout the United States and Canada which printed the Daily Racing Form, a newspaper different in form, content and circulation from the Morning Telegraph.

court orders and rules which was the subject of various opinions and orders in the trial court and which delayed this litigation for many years. (SA1) On August 11, 1976, on Triangle's Motion for Summary Judgment, the trial court dismissed the Union's claim that it—rather than another International Typographical Union which had a collective bargaining agreement with Triangle—was entitled to represent the employees at the Daily Racing Form in Hightstown.

The case was called for trial on the remaining claims on January 19, 1977, but dismissed by Order dated January 31, 1977 pursuant to Rule 41(b) of the Federal Rules of Civil Procedure "for plaintiff's woeful failure to be ready to proceed to trial." Upon the Union's motion, the Court conditionally reinstated the case on March 9, 1977 and eventually permitted the case to proceed again to trial, even though the Union failed to comply with the conditions of the reinstatement. See Order of March 9, 1977 attached hereto as SA1.

The case was again called for trial which was held during eight days in January and February, 1978. The trial court rendered its findings of fact and conclusions of law on September 14, 1978. Although finding no relocation had occurred, the District Court initially found that Respondent had suspended the Morning Telegraph and was liable for suspension pay to Petitioner's members. The District Court denied Petitioner's claim for supplemental pension benefits.

After subsequent motions for reargument filed by Petitioner and Respondent, the District Court, *inter alia,* awarded Petitioner $149,387.02 for sick pay and holiday pay which had accrued prior to the strike, but denied any recovery for suspension pay based on the circumstances of record, finding that Petitioner had never asserted such a

claim prior to or during trial, and that defendant would be substantially prejudiced by the post-trial amendment of the complaint. On appeal, the Court of Appeals for the Second Circuit affirmed the decisions of the District Court on December 18, 1980. Petitioner's Petition for Rehearing was denied on February 10, 1981.

REASONS WHY THE WRIT SHOULD NOT ISSUE

The Decision of the Second Circuit Is Not in Conflict With Decisions of This Court or Other Courts of Appeals

Petitioner has presented no special or important reason why this Court should decide any question presented by the decisions below. The rulings of which it complains were grounded on the unique and unusual circumstances and facts of this case, and do not contravene or even implicate any important area of federal policy. Furthermore, Petitioner has not shown that the Court of Appeals' decision conflicts with decisions of this Court or other Courts of Appeal.

A. The Pension Payments Claim

Supplemental pension payments were denied based upon a reasonable interpretation of the collective bargaining agreement between the parties. The collective bargaining agreement contained two pension clauses. The Union members' principal pension, to which Respondent contributed 5% of the members' gross compensation, was the International Typographical Union Negotiated Pension Plan. Respondent complied with that Plan, and that pension is not at issue. At issue here are supplemental pension payments, not tied to the principal pension, which were provided for in a Supplemental Agreement to the collective bargaining agreement as an additional economic condition to the Union's contract with the Morning Telegraph. These supplemental pension payments were linked to and dependent upon the existence of the collective bargaining agreement, did not vest, could not exceed $50.00 per month and were not part of a funded pension plan.[2]

2. At trial, Petitioner failed to prove that there were any general funds with which to make the supplemental pension payments.

The Court of Appeals affirmed the District Court's findings as to these supplemental pension payments, which were as follows:

> "However, the provision of this plan states '[t]he Pension Plan will not be terminated or modified during the life of the collective bargaining agreement without mutual consent.' (Supplemental Agreement at p. 10). The language of this provision implicitly suggests that the plan may be terminated upon the expiration of the Supplemental Agreement. As determined in the earlier Opinion of this Court, the agreement terminated when the defendant suspended the operations of the Morning Telegraph. Moreover, the agreement provides that the Pension Plan would not be funded. Payments of benefits were to be made from the general funds of the Morning Telegraph. When the Morning Telegraph ceased to exist, no further payments could be made from its general funds. The Plan must, therefore, have been intended to terminate when the Morning Telegraph ceased its operations. Consequently, the defendant is not liable for pension payments which plaintiff claims to have accrued after the date of suspension of operations."

Contrary to Petitioner's claim that rights to the supplemental pension payments had "vested", there is no vesting provision in the supplemental pension clause. Furthermore, it is well established that the rights of union members to benefits under a collective bargaining agreement cease upon the discontinuance of a business. *Fraser v. Magic Chef-Food Giant Markets, Inc.*, 324 F. 2d 853 (6th Cir. 1963); *Bakery & Confectionary Workers v. Great A. & P. Tea Co.*, 357 F. Supp. 1322 (W. D. Pa. 1973). Where a pension is subject to certain conditions, the happening of those conditions can effectively terminate the

pension. *Boase v. Lee Rubber & Tire Corporation*, 437 F. 2d 527 (3rd Cir. 1970). In the present case, the Supplemental Agreement terminated upon the discontinuance of the Morning Telegraph, and the obligation to make the supplemental pension payments terminated also, as the courts below held. See *Baake v. General American Transportation*, 351 F. Supp. 962 (N. D. Ill., 1972).

B. The Suspension Pay Claim

Likewise, the courts below relied upon the circumstances of record in this case in concluding that Petitioner could not recover for suspension pay. The Amended Complaint asserted no liability or claim for suspension pay. (A. 36). In its Order of December 20, 1979, the District Court specifically found that prior to and during the second trial, Petitioner had never asserted a claim for suspension pay. (A. 28) Indeed, as a condition to reinstatement of Petitioner's Amended Complaint, which had been dismissed after the first trial, the District Court specifically directed Petitioner to list its contentions. (SA3) In its Proposed Pretrial Order which followed, Petitioner made no claim for suspension pay. (A. 28) Only in its belatedly submitted post-trial papers did Petitioner for the first time contend it was entitled to suspension pay. (A. 26)

At no time did the Union move to conform the pleadings to the evidence or to amend its complaint to assert a cause of action for suspension pay. Therefore, the Union's entitlement to maintain a claim for suspension pay depends on whether the claim was "tried by express or implied consent" of Triangle. F. R. C. P. 15(b). As stated by the Second Circuit in *Browning Debenture Holders' Committee v. Dasa Corp.*, 560 F. 2d 1078, 1086 (2nd Cir. 1977):

> "The purpose of Rule 15(b) is to allow the pleadings to conform to issues already tried, not to extend the pleadings to introduce issues inferentially suggested by incidental evidence in the Records."

In accord: *Crane Co. v. American Standard, Inc.*, 88 F. R. D. 199, 205 (S. D. N. Y. 1980).

On this issue of trial by consent, the District Court made the specific finding that "a review of the trial transcript indicates that this claim was not actually litigated and that, in any case, defendant did not expressly or impliedly consent to trial of the claim." The District Court further found that evidence touching on suspension was introduced only in connection with the claim for relocation severance payments, that there was undue delay in asserting the claim for suspension, and that Triangle would be substantially prejudiced by an amendment of the complaint after the conclusion of the trial. (A. 29) Based on the Court's findings and the record in this case, it cannot be said that the courts below abused their discretion in disallowing Petitioner's claim for suspension pay.

Contrary to the vehement assertions of Petitioner, Respondent never acknowledged liability for suspension pay. While the fact of suspension was admitted for the purposes of trial since there was no claim for suspension pay, the voluntariness or liability for suspension pay was not. The proof of this point is that had suspension pay been claimed and liability therefor admitted by Respondent, it would have been pointless to hold an eight-day trial to litigate the issue of whether a relocation occurred.[3]

The cases relied upon by Petitioner are all distinguishable from the facts in this case. In none of the cases cited by Petitioner was prejudice found to the defendant, whereas here the District Court specifically found preju-

3. In its post-trial motions, Petitioner claimed that suspension pay was equal to relocation severance pay.

dice to Respondent. (A. 29) Indeed, had Petitioner raised the issue of suspension pay, Respondent could have raised the existence of an arbitration clause as a bar to litigation[4] as well as other affirmative defenses, declined to stipulate to certain matters and tried the case differently. In addition, Respondent was prejudiced by being unable to submit testimony on the suspension pay issue from the Morning Telegraph's publisher whose deposition Respondent took prior to his death and before the trial of this case.

CONCLUSION

The Petition herein raises no special or important issue for decision by this Court. The decisions of the two lower courts were grounded on contract interpretation and the unique facts of this case. These decisions do not contravene any decisions of this Court or other Courts of Appeal, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: June 5, 1981

4. When Respondent raised the existence of the arbitration clause as a potential bar to the suspension pay claim in its post-trial motion, Petitioner replied as follows:

> "The defendant never pleaded the affirmative defense of arbitration in its answer to plaintiff's complaint, which answer contained counterclaims against the plaintiff herein. This defense was, therefore, conclusively waived." Plaintiff's Memo in Opposition to Reargument, p. 2, 8/21/79.

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2674

NEW YORK TYPOGRAPHICAL UNION, NO. 6,
Plaintiff,

v.

TRIANGLE PUBLICATIONS, INC.,
Defendant.

Order

On January 19, 1977, when this matter was called for trial, counsel for the plaintiff failed to submit its pre-trial memorandum of law and its proposed findings of fact and conclusions of law, contrary to orders and directives of this Court which had been outstanding since August 11, 1976. Upon motion of defendant's counsel, this Court dismissed plaintiff's complaint for failure to prosecute pursuant to Rule 41(b) Fed. R. Civ. P. Defendant at that time consented to a discontinuance of its counter-claim. The dismissals were made without prejudice.

As the record in this case reflects, the above was not plaintiff's first default in this action. Plaintiff failed to file a reply to defendant's counter-claims until more than *one year* after those counter-claims were served and filed. Plaintiff failed to respond to defendant's eight interroga-

tories and defendant's requests for admission until three months after service. Indeed, plaintiff did not, until the day of trial, provide the defendant with certain discovery which had long been due.

Both parties now move against this Court's January 19, 1977 order dismissing the action. Plaintiff moves, pursuant to Rule 60(b) Fed. R. Civ. P. for an order vacating the dismissal and reinstating the complaint. Defendant moves for an order pursuant to Rule 41(b) Fed. R. Civ. P. dismissing the complaint with prejudice.

The law in this Circuit is that a significant and unexplained delay by the plaintiff in the service of pleadings or other vital court papers can result in a dismissal for failure to prosecute, regardless of whether there has been any prejudice to the defendant. See *Joseph Muller Corp. v. Societe Anonyme de Gerance et D'Armement*, 508 F. 2d 814 (2d Cir. 1974) (*per curiam*); *Messenger v. United States*, 231 F. 2d 328 (2d Cir. 1956). It is further the established rule in this Circuit that dismissals for failure to prosecute are largely a matter for the trial court's discretion. See *Joseph Muller Corp., supra.*

In this case plaintiff's action has moved forward only through the motion practice of the defendant or through the prodding of this Court. In the three years during which this action has been pending, plaintiff has shown no significant interest in moving the case forward or proceeding to trial. In three years, the only applications plaintiff has ever made to this Court have been for extensions of time in which to respond to defendant's pleadings or motion practice. Plaintiff had originally pleaded class action allegations in its complaint; yet plaintiff never moved for an order certifying this as a class action. The issue of class action status was not resolved until defendant made a successful motion to strike those allegations. See *Powers v. Triangle Publications*, 74 Civ. 2674 (S. D. N. Y. Dec. 31, 1974).

In considering plaintiff's motion to reopen the case, it is appropriate and indeed necessary for this Court to examine the entire procedural history of the litigation. See *Securities and Exchange Commission v. Power Resources Corp.*, 495 F. 2d 297 (10th Cir. 1974); *Sheaffer v. Warehouse Employees Union*, 408 F. 2d 204 (D. C. Cir.), *cert. denied*, 395 U. S. 934 (1969). It is clear that defendants have carried the burden of moving this action; it is equally clear that plaintiff has totally failed to carry its burden. See *S&K Airport Drive-Ins, Inc. v. Paramount Film Distributing Corp.*, 58 F. R. D. 4 (E. D. Pa. 1973).

In its moving papers, plaintiff's counsel assert that they were under a good faith belief that this Court had granted to them until the second or third day of trial in which to file their pre-trial papers. This allegation is said to be founded on a telephone conversation between one of plaintiff's counsel and one of this Court's clerks. While it is clear that no such permission was in fact granted by the Court, plaintiff's papers do indicate that the failure to file pre-trial papers was due to a misunderstanding, inadvertence, or perhaps even a good faith mistake by counsel. If such is the case, dismissal in unwarranted and the Rule 60(b) motion should be granted. See *Pond v. Braniff Airways, Inc.*, 453 F. 2d 347 (5th Cir. 1972). Of course, there is not even any claim by the plaintiff that it had permission to delay the filing of pre-trial papers from August 1976 until January 1977, when the claimed conversation with the clerk was held.

Accordingly, it remains this Court's view that the prior order dismissing the complaint was not an abuse of discretion. However, upon reconsideration, and since there is no evidence that the failure of counsel was caused by any actions of the plaintiff itself, the Court determines that, in the interests of justice, plaintiff should be given an opportunity to reinstate the complaint by demonstrat-

ing its willingness to move this action forward and to comply with the Court's directives.

Accordingly, plaintiff's motion to vacate the order of dismissal heretofore entered is denied unless within ten days hereof plaintiff serves upon the defendant a proposed form of pre-trial order, setting forth all facts not in dispute, all facts which are in dispute, plaintiff's contentions, a list of plaintiff's trial witnesses, and a list of plaintiff's trial exhibits. Defendant shall respond with its contentions promptly thereafter. As a further condition to the reinstatement of the complaint, plaintiff must file with the Court within twenty days hereof a pre-trial memorandum of fact and law addressing the issues raised by the decision on the summary judgment motion, and also must file proposed findings of fact and conclusions of law. The Court will not accept from the plaintiff any restating of its position on the summary judgment motion; the pre-trial memorandum must address the action as it now stands.

In the event plaintiff complies with each and every condition of this order, the complaint and the counterclaims will be reinstated. If plaintiff fails to comply with any of the foregoing, the judgment of dismissal heretofore entered shall stand and each of the parties present motions shall be denied.

SO ORDERED.

Dated: New York, New York
March 9, 1977

/s/ LAWRENCE W. PIERCE
Lawrence W. Pierce
U. S. D. J.